Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LASALLE BANK LAKE VIEW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Seventh Circuit err in directing the Bankruptcy Court to accept jurisdiction over a collateral dispute between two creditors of the bankrupt remanded to it by the District Court even though the underlying bankruptcy case had been previously dismissed with the consent of all of the parties during the pendency of the appeal to the District Court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, LaSalle Bank Lake View ("Bank"),[1] seeks a writ of certiorari to review an opinion and order of the United States Court of Appeals for the Seventh Circuit which reversed an order of the District Court that had affirmed an order of the Bankruptcy Court that the Bankruptcy Court did not have jurisdiction to reopen a previously dismissed bankruptcy case.

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[1] Pursuant to Rule 21.1, Bank's parent corporations, in ascending order, are:

LaSalle National Corporation
ABN Amro North America, Inc.
ABN Amro Bank N.V.
ABN Amro Holding N.V.

All of the Bank's subsidiaries are wholly owned.

OPINIONS BELOW

Opinion of the United States Court of Appeals for the Seventh Circuit:

Date:	August 2, 1995
Reported:	60 F.3d 1286
Reprinted:	Appendix at App. 1.

Opinion of the United States District Court for the Northern District of Illinois:

Date:	March 21, 1994
Reported:	166 B.R. 322
Reprinted:	Appendix at App. 35.

Oral Ruling of the United States Bankruptcy Court for the Northern District of Illinois:

Date:	February 10, 1993
Reported:	Not reported.
Reprinted:	Appendix at App. 31.

JURISDICTION

The opinion and order of the United States Court of Appeals for the Seventh Circuit was issued on August 2, 1995. No motion for rehearing was filed. This petition for a writ of certiorari is being docketed in this Court within 90 days of the opinion and order. The jurisdiction of this Court exists under 28 U.S.C. §1254(1).

STATUTES

11 U.S.C. § 349 provides:

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that are dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title,

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 350 provides:

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 1112(b), in relevant part, provides:

(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including—

* * *

(2) inability to effect a plan;

28 U.S.C. § 157 provides:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolutions may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 134(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (l) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of any party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specifically designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

Title 28 U.S.C. §1334, in relevant part, provides:

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

* * *

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Title 28 U.S.C. §1367, in relevant part, provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20 or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

STATEMENT OF THE CASE

This Petition involves a dispute between the Bank and the Internal Revenue Service ("Government") concerning the Bank's entitlement to proceeds ("Proceeds") from the sale of certain assets of a bankrupt corporation, Statistical Tabulating Corporation ("Stat Tab"). Stat Tab was completely liquidated in 1990 and no longer exists. While the Government had agreed that the Bank's lien for its debt of approximately $1.5 million was superior to the Government's lien for taxes, it sought to pursue a claim in the Bankruptcy Court after the Stat Tab Bankruptcy Case had been dismissed that the Bank's lien did not apply to all of the Proceeds.

The Bankruptcy Court for the Northern District of Illinois, on June 21, 1991, on the motion of the Bank, entered an order for the turnover of the Proceeds to the Bank at a hearing at which the Government did not appear. Pursuant to this order, approximately $700,000 was turned over to the Bank. The Government thereafter appealed the turnover order to the District Court requesting: (i)

vacation of the order, claiming the Government had not been properly served with notice of the hearing at which the order was entered (notice had been sent via facsimile to the Department Justice in Washington, D.C. and by messenger to the Regional Counsel for the Internal Revenue Service, but not to the U.S. Attorney in Chicago), and (ii) remand of the matter to the Bankruptcy Court to determine whether the Bank's lien extended to all of the Proceeds.

During the pendency of the Government's appeal, on motion of the Bank and with the consent of the Government, the Bankruptcy Court, on January 14, 1992, disbursed the remaining proceeds from the sale of Stat Tab's assets (as to which the Government did not contest the applicability of the Bank's superior lien) and, pursuant to 11 U.S.C. §1112(b)(2), dismissed the Stat Tab Bankruptcy Case. (App. 13-15) No appeal was taken from this dismissal. This completed the total liquidation of Stat Tab's assets, the disbursements of all proceeds thereof, and the disposition all of the matters related to it in the Bankruptcy Court.

On April 16, 1992, the District Court (Nordberg, J.): (i) held the Bank's notice to the Government of its motion for the turnover order was insufficient; (ii) vacated the turnover order because of the notice; and (iii) remanded the matter to the Bankruptcy Court with directions that it determine whether the Bank's lien covered all of the Proceeds. (App. 16-25) The Bank filed a timely motion for reconsideration in which it asked the District Court to find, as a matter of law, that its lien extended to all of the Proceeds. The District Court, on June 2, 1992, denied the Bank's motion for reconsideration on the ground that it did not have a sufficient record to make such a determination. (App. 26-30)

On December 7, 1992, the Government presented a motion to the Bankruptcy Court to reopen the dismissed Stat Tab Bankruptcy Case. The Bankruptcy Court raised the question as to whether it had jurisdiction to do so. On February 10, 1993, the Bankruptcy Court, in an oral ruling, held that while the District Court's opinion could be given effect in a court of general jurisdiction, the liquidation of Stat Tab and the dismissal of the Stat Tab Bankruptcy Case removed any basis for it to exercise jurisdiction. (App. 33-34) In doing so, the Bankruptcy Court observed:

> All of the assets, as I understand it, have been transferred. And now there is a dispute between the bank and the United States as to how those moneys should be disposed of. That, to me, isn't sufficient reason to reopen the case or vacate that order of dismissal, which was entered with notice to the United States without objection of the United States.
>
> I think that there is, as euphemistically stated, a contract here or the law that can be brought before the Court in a proper court of general jurisdiction, not the Bankruptcy Court. No longer is anything arising out of the code or related to the code or whatever that—I'm sure I'm misquoting that section of Title 28 that talks about how we should handle these matters. But there is nothing here before the Bankruptcy Court, as far as the Court is concerned. That doesn't mean that Judge Nordberg's order is not effective. It is. It sets up the rights of the parties. But still, it has to be brought—it can't be brought here. You can't reopen this dismissed Chapter 11 case. (App. 33-34)

The Government appealed the denial its motion to reopen the dismissed Stat Tab Bankruptcy Case to the District Court. On March 21, 1994, the District Court (Williams, J.) affirmed the decision of the Bankruptcy

Court. (App. 35-43) The Government properly effected an appeal to the United States Court of Appeals for the Seventh Circuit.

On August 2, 1995, the Court of Appeals reversed the District Court in a majority opinion. The majority first noted that the dismissal of a bankruptcy case normally results in dismissal of related proceedings because federal jurisdiction is premised upon the nexus between the underlying bankruptcy case in the related proceedings. (App. 5-6) The statute governing the effect of such dismissals is 11 U.S.C. §349. Although there is no authorization for reopening a dismissed bankruptcy case in the Bankruptcy Code, including in §349, some Courts of Appeals have held that the silence of §349 on the subject means bankruptcy courts have discretion to retain jurisdiction over related proceedings notwithstanding the disappearance of the basis for the bankruptcy court's jurisdiction. (App. 5-6)

The majority, however, did not decide the appeal on the basis that §349 granted implied discretion for the Bankruptcy Court to hear a collateral matter. Instead, it stated: "[i]n the instant case, the integrity of the appellate process is at serious risk if a bankruptcy court can deprive a district court of jurisdiction over an appeal by simply dismissing the underlying bankruptcy." (App. 7) It reasoned that when the Government filed its notice of appeal challenging the turnover order, the Bankruptcy Court lost all power to affect the matter on appeal. Therefore, the Bankruptcy Court did not need to "retain" jurisdiction over the matter when it dismissed the Stat Tab Bankruptcy Case in order to be able to assert jurisdiction once the collateral matter was remanded. It held that the Bankruptcy Court was not free to ignore the remand of the district court, citing this Court's decision in *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 306, 68 S.Ct.

1039, 1040, 92 L. Ed. 1403 (1948). (App. 7-8) As to whether the absence of any power under §349 for the Bankruptcy Court to resurrect its only basis for jurisdiction by reinstating the Stat Tab Bankruptcy Case foreclosed the Bankruptcy Court from following the District Court's mandate, the majority stated that this "cannot be the result intended by Congress." (App. 2) The Court of Appeals remanded the case to the Bankruptcy Court for further proceedings consistent with its direction. (App. 8).

Judge Emilio Garza of the Fifth Circuit Court of Appeals, who served by designation on the Seventh Circuit panel, submitted a separate concurring opinion. He stated that the majority's direction that the Bankruptcy Court had to adjudicate the dispute between the Government and the Bank improperly deprived the Bankruptcy Court of its discretion to decide not to retain jurisdiction, citing *In re Querner*, 7 F.3d 1199 (5th Cir. 1993); *In re Carraher*, 971 F.2d 327 (9th Cir. 1992); *In re Morris*, 950 F.2d 1531 (11th Cir. 1992). In Judge Garza's opinion, the remand by the District Court placed the Bankruptcy Court in a situation analogous to that where the disposition of a federal claim has left a district court with only pending state claims. In such a situation, the decision to exercise jurisdiction should be based upon the factors set out by this Court in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 353, 108 S.Ct. 614, 620-21, 98 L.Ed. 2d 720 (1988). (App. 11, n.5) Judge Garza concluded that those factors, in his opinion, pointed to the Bankruptcy Court exercising its jurisdiction, and on that basis, he concurred in the direction of the Court of Appeals. (App. 12)

Jurisdiction in the Courts Below

The initial jurisdiction of the Bankruptcy Court was based on 28 U.S.C. §157(b)(1). Whether the bankruptcy

court after the dismissal of the bankruptcy case had jurisdiction over the remand from the district court is the subject of this appeal.

The District Court had jurisdiction under 28 U.S.C. §158(a) over both the Government's appeal from the Bankruptcy Court's (i) turnover order, and (ii) denial of the Government's motion to reopen the dismissed bankruptcy case.

The District Court's affirmance of the Bankruptcy Court's denial of the Government's motion to reopen the dismissed bankruptcy case resolved all pending issues as to the bankruptcy case and was a final order. The Court of Appeals had jurisdiction under 28 U.S.C. §158(d).

REASONS FOR GRANTING THE WRIT

Summary of Argument

Bankruptcy courts are courts of limited jurisdiction. *Celotex Corporation v. Edwards*, ____ U.S. ____, 115 S.Ct. 1493, 1498, 131 L.Ed 2d 403, 410 (1995). Once the Stat Tab Bankruptcy Case was dismissed, the Bankruptcy Court lacked the power to adjudicate a lien dispute between two creditors. The decision of the Court of Appeals that the District Court could compel the Bankruptcy Court to resolve that dispute represents the judicial creation of bankruptcy court jurisdiction devoid of any Congressional authorization. In addition, the decision conflicts with the interpretation of the statute governing the effect of the dismissal of a bankruptcy case (11 U.S.C. §349) as described by the United States Court of Appeals for the Ninth Circuit and a number of bankruptcy courts.

Even if the District Court had the power to direct the Bankruptcy Court to decide the extent of the Bank's lien

rights, notwithstanding the prior dismissal of the Stat Tab Bankruptcy Case, the Court of Appeals should have permitted the Bankruptcy Court to exercise its discretion as to whether it would hear the matter. The denial of such discretion directly conflicts with decisions by the United States Courts of Appeals for the Second, Third, Fifth, Ninth and Eleventh Circuits.

The Bankruptcy Court Did Not Have Jurisdiction

Initially, it must be noted that the Bankruptcy Court did not treat the dismissal of the Stat Tab Bankruptcy Case as having divested the District Court of its appellate jurisdiction over the Government's appeal of the turnover order. As the Bankruptcy Court specifically recognized, the District Court's ruling "sets up the rights of the parties." (App. 34) The only question decided by the Bankruptcy Court was whether once the Government obtained a determination that the turnover order was invalid, could the Government then initiate its claim that the Bank's lien did not cover all of the Proceeds in the Bankruptcy Court. The Bankruptcy Court correctly determined that the claim could not be presented in the Bankruptcy Court because there was no jurisdictional basis for it. The Government had merely chosen the wrong forum for its claim. The Court of Appeals, however, by its decision requires the Bankruptcy Court to exercise jurisdiction over the Government's claim even though no statutory authority exists for that jurisdiction.

In *Finley v. United States*, 490 U.S. 545, 548, 109 S. Ct. 2003, 2006, 104 L. Ed.2d 593 (1989), this Court set out the two requirements for a lower federal court's jurisdiction:

> The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it.* . . .

The Bankruptcy Court here concluded that it had not been granted the power by Congress to determine a lien dispute between two creditors.

Bankruptcy courts have only three grants of jurisdiction from Congress which are derived through the district courts. They are for matters "arising under Title 11, arising in or related to cases under Title 11." 28 U.S.C. §§1334(b)(1), 157(b)(1).

When the Government appeared before the Bankruptcy Court on its motion to reopen the Bankruptcy Case, it was seeking an interpretation of the terms of the Bank's lien, purely a matter of state law. Its claim obviously did not arise under Title 11 because it did not invoke Title 11. *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987). It did not "arise in" the Bankruptcy Case because it was not a claim based on some unique aspect of bankruptcy proceedings. *In re Wood*, 825 F.2d at 97; *1 Collier on Bankruptcy*, §3.01[1][c][v] at 3-32 (15th ed. 1993). Finally, it was not "related to" the Bankruptcy Case, because Stat Tab no longer existed and, with the dismissal of the Stat Tab Bankruptcy Case, the dispute between two creditors could not conceivably have had any effect on the bankrupt or its estate. *Celotex Corporation v. Edwards*, ____ U.S. ____, 115 S.Ct. 1499 n. 5, 131 L. Ed.2d 403, 410 n. 5 (1995); *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). As this Court noted in *Celotex*, "bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor." 115 S.Ct. at 1499 n. 6, 131 L. Ed.2d at 411 n. 6.

The fact that the Stat Tab Bankruptcy Case had been dismissed is a critical factor in whether the Bankruptcy

Court had the power to accept the direction of the District Court. A bankruptcy case can be concluded by a dismissal or a closure.

Under 11 U.S.C. §350(a), "when an estate is fully administered and the court has discharged the trustee, the court shall close the case." The statute further provides that the case can be reopened "to accord relief to the *debtor* or for other cause " (emphasis added). 11 U.S.C. §350(b).

Dismissals, however, are dealt with in 11 U.S.C. §349. Unlike §350, §349 has no provision for reinstating a dismissed case. The authorization for bankruptcy courts to reopen closed cases in §350, and the absence of any authority for bankruptcy courts to reinstate dismissed cases in §349, must mean Congress did not intend to give bankruptcy courts the power to use dismissed cases as a basis for further proceedings. *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L. Ed.2d 17, 24 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.").

The term "dismissal" is used in all forms of litigation and its effect is commonly understood. It "closes the file;" leaving nothing a party "can do to fan the ashes of that action into life and the court has no role to play." *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963) (referring to a voluntary dismissal under Federal Rule of Civil Procedure 41(a)). The Ninth Circuit Court of Appeals in a case in which a party sought to reopen a dismissed case recognized that the dismissal of a bankruptcy case removes any power from the bankruptcy court to reopen it:

> Once the bankruptcy was dismissed, a bankruptcy court no longer had power to order the stay or to award damages allegedly attributable to its vacation. A remand by us to the bankruptcy court would therefore be useless.

In re Income Property Builders, Inc., 699 F.2d 963, 964 (9th Cir. 1983). The same conclusion as to the operation of a dismissal was reached in *In re Woodhaven, Ltd.*, 139 B.R. 745, 747-48 (Bkrtcy. N.D. Ala. 1992) and *In re Garcia*, 115 B.R. 169, 170 (Bkrtcy. N.D. Ind. 1990).

Because §349 does not preserve bankruptcy court jurisdiction following a dismissal, there is no source of Congressional authorization for the Bankruptcy Court to resolve the collateral dispute over the interpretation of the Bank's lien. Supplemental jurisdiction does not exist because 28 U.S.C. §1367 does not confer on bankruptcy courts the power to exercise supplemental jurisdiction. *In re Walker*, 51 F.3d 562, 570-73 (5th Cir. 1995).

When a bankruptcy case is filed, 28 U.S.C. §1334(b)(1) and §157(b)(1) grant broad jurisdiction to the bankruptcy courts on the basis of the pending bankruptcy case. Bankruptcy courts, however, are not black holes from which collateral matters may never re-emerge. No statutory provision provides for bankruptcy court jurisdiction to continue after the dismissal of the underlying case. The direction of the Court of Appeals that the Bankruptcy Court must take the dispute concerning the Bank's lien rights is an exercise in raw judicial creationism. The implications that arise from the creation of this never-ending jurisdiction for bankruptcy courts warrant this Court granting this Petition.

The Bankruptcy Court Should Have Been Permitted To Exercise Its Discretion As To Whether To Hear The Government's Claim

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed 2d 720 (1988), this Court held that District Courts had the inherent discretion to remand to a state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be "inappropriate." Such discretion is to be exercised in a way that "will best accommodate the values of economy, convenience, fairness and comity." 484 U.S. at 351.

The Second, Third, Fifth, Ninth and Eleventh Circuits have each held that although related proceedings in the bankruptcy courts ordinarily should be terminated when the underlying bankruptcy case is dismissed, a bankruptcy court has the sound discretion to retain jurisdiction over them, using the factors set out in *Carnegie-Mellon*. *In re Porges*, 44 F.3d 159, 162 (2d Cir. 1995); *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989); *In re Querner*, 7 F.3d 1199, 1201-02 (5th Cir. 1993); *In re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992); *In re Morris*, 950 F.2d 1531, 1533-34 (11th Cir. 1992).

In sharp contrast with these decisions, the Court of Appeals did not give the Bankruptcy Court any discretion to decide whether it was the appropriate court for determination of the Bank's lien rights. This prompted Judge Garza to write his concurring opinion. He stated that the ruling of the Court of Appeals should have recognized the prevailing view that when a bankruptcy case is dismissed, the bankruptcy court has discretion as to whether it should retain a collateral dispute. The District Court in remanding the matter to the Bankruptcy Court after having

granted the Government's motion to vacate the turnover order, did not address whether the intervening dismissal of the Stat Tab Bankruptcy Case warranted a decision by the Bankruptcy Court that it was not the appropriate Court for this dispute among creditors.

The Court of Appeals' denial of any discretion to the Bankruptcy Court conflicts with the decisions of five other Circuits and deprives the Bankruptcy Court of an inherent power of discretion that has been recognized in those other Circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: October 31, 1995

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-2331

IN THE MATTER OF:
STATISTICAL TABULATING CORP., INC.,

Debtor.

APPEAL OF:
UNITED STATES OF AMERICA

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 93 C 2690—Ann C. Williams, *Judge*.

ARGUED DECEMBER 2, 1994—DECIDED AUGUST 2, 1995

Before BAUER, GARZA,* and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. This case presents a novel issue regarding the jurisdiction of bankruptcy courts. During the time the government was appealing an order of the bankruptcy court, the bankruptcy court disposed of remaining matters and dismissed the bankruptcy. LaSalle

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* The Honorable Emilio M. Garza of the Fifth Circuit Court of Appeals, sitting by designation.

Bank Lake View ("LaSalle") now argues that the dismissal deprived the district court of jurisdiction to rule on the matter on appeal, and deprived the bankruptcy court of jurisdiction to accept the case on remand from the district court. This cannot be the result intended by Congress, and we therefore reverse.

I. BACKGROUND

Statistical Tabulating Corporation ("StatTab") filed a petition for relief under Chapter 11 of the Bankruptcy Code on February 27, 1990. The government submitted a proof of claim in that case for delinquent employment taxes. In order to determine its rights in relation to StatTab's other major creditor and lien holder, LaSalle, the government filed an adversary proceeding. As a result of that proceeding, the bankruptcy court entered an agreed order stating that LaSalle's lien had priority over the government's claim.

The bankruptcy court allowed StatTab's operating assets to be liquidated in June and August of 1990, and following the liquidation, LaSalle asked the bankruptcy court to turn over to LaSalle all the proceeds obtained from the liquidation (amounting to approximately $730,000) to partially satisfy its lien. LaSalle failed to properly notify the government of this motion, however, and the government did not appear in court to object. The court allowed the turnover and when the government learned belatedly of the court's order, it appealed to the district court, arguing that LaSalle had failed to properly serve notice of the motion for turnover, and that the turnover itself was improper because it provided LaSalle a greater share than had been intended by the agreed order that emerged from the adversary proceeding.[1]

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[1] The concurrence relies on a line of cases where separate adversary proceedings or related state law claims were pending in the bankruptcy court or on appeal when the underlying bankruptcy

(Footnote continued on following page)

While the government's appeal was pending, the remainder of StatTab's assets were liquidated, and LaSalle moved for a turnover of those amounts as well as for dismissal of the case. This time, LaSalle properly served the government with its motion, and the government did not object to the turnover. Although the government called the bankruptcy court's attention to the matter pending on appeal, and suggested that the court keep the case open, the government did not formally object to the dismissal of the case. The court disbursed the remaining assets to LaSalle and dismissed the case.

Approximately three months later, on April 16, 1992, the Honorable John A. Nordberg of the United States District Court for the Northern District of Illinois ruled in the government's favor in the pending appeal, holding that LaSalle had failed to properly serve notice of the first turnover motion, and directing the bankruptcy court to consider whether the agreed order in fact contemplated that LaSalle would hold a priority position over the government in all of the proceeds of StatTab.[2] When LaSalle

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[1] *continued*
was dismissed. Hence, these cases address what happens to a "related proceeding" when the underlying bankruptcy is dismissed. That is simply not the case here. Rather than a related proceeding, the matter on appeal was an order arising out of the underlying bankruptcy proceeding itself. We agree with the concurrence that if the matter on appeal had been a separate adversary proceeding or a related state law claim, the bankruptcy court would have discretion to retain jurisdiction over the related proceeding. As explained *infra*, because the matter on appeal arose from the underlying bankruptcy proceeding itself, and because the dismissal of the bankruptcy proceeding did not moot the matter on appeal, the bankruptcy court did not have the power to dismiss the matter on appeal and did not have discretion to refuse to abide by the mandate of the district court.

[2] LaSalle moved for a reconsideration of the ruling and on June 2, 1992, the district court denied LaSalle's motion to reconsider and remanded the case to the bankruptcy court in accordance with the April 16, 1992 memorandum opinion and order. LaSalle did not appeal the district court's decision to this court.

did not respond to the government's discovery, the government moved to reopen the case before the bankruptcy court and to compel a response to its discovery.

The bankruptcy court, *sua sponte*, questioned its jurisdiction to reopen the case and invited briefs on the subject. After full briefing, the bankruptcy court denied the motion to reopen, concluding that it no longer had jurisdiction to consider the issue remanded because it had previously dismissed the underlying case. The government appealed that decision to the district court,[3] which affirmed on March 21, 1994, explaining that the case had been dismissed, not closed and therefore could not be reopened. The government now appeals that decision.

II. DISCUSSION

LaSalle argues that the bankruptcy court lacked jurisdiction to "reopen" the case because dismissal of the underlying proceeding results in a dismissal of all related proceedings, including, apparently, matters then pending on appeal. LaSalle makes much of the distinction between closing a bankruptcy case and dismissing a bankruptcy case. A closed case, LaSalle argues, can be reopened for good cause in the court's discretion. A dismissed case, however, can never be "undismissed" in LaSalle's view, because the bankruptcy court divests itself of jurisdiction when it dismisses a case. Thus, LaSalle argues that the bankruptcy court is without jurisdiction even when a pending appeal that was not mooted by the dismissal is remanded to the court for further proceedings.

We see several problems with LaSalle's position. First, LaSalle admits that when a case is dismissed, "it is as if there had been no bankruptcy." (LaSalle Br. at 8.) Section 349 of the Bankruptcy Code explains that a dismissal

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[3] The case was assigned this time to the Honorable Ann C. Williams of the United States District Court for the Northern District of Illinois for the purposes of this appeal.

"revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case . . . ." The objective of section 349 is to "restore all property rights, insofar as is practicable, to their positions when the case was filed." *In re Safren*, 65 B.R. 566, 571 (Bankr. C.D. Cal. 1986) (citations omitted); *In re Newton*, 64 B.R. 790, 793 (Bankr. C.D. Ill. 1986) (to the extent possible, dismissal of a petition reverses what has transpired during a bankruptcy). A literal reading of section 349 then would require LaSalle to return to the estate the $730,000 that it received in the initial turnover. LaSalle does not argue, however, the dismissal had that effect here.[4]

In LaSalle's view, when a bankruptcy court dismisses a case, it dismisses even those discrete issues which may be pending on appeal in the district court and that having done so, the bankruptcy court cannot accept the case back on remand from the district court because the case no longer exists. Carrying LaSalle's argument to its logical conclusion, the bankruptcy court could avoid review by the district court simply by disbursing the estate's assets and dismissing the case. LaSalle's interpretation would also suggest that the bankruptcy court and the district court must have concurrent jurisdiction over issues pending on appeal. Neither of these conclusions can be the result Congress intended in Section 349.

Dismissal of a bankruptcy proceeding normally results in dismissal of related proceedings because federal jurisdiction is premised upon the nexus between the underlying bankruptcy case and the related proceedings, but this

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[4] The district court appears to have assumed that this was a typical dismissal, where the parties were returned to their pre-petition status, and the assets were restored to the estate. Such was not the case here. This was a "liquidating Chapter 11" and the bankruptcy court clearly meant for its disbursements to creditors to retain their effect following the dismissal. If this had been a typical dismissal, and the assets had been restored to the estate, the matter on appeal may well have been mooted by the dismissal.

general rule is not without exceptions. *In re Morris*, 950 F.2d 1531, 1534 (11th Cir. 1992). Nothing in Section 349 requires that result in all cases. As the Ninth Circuit has explained, "[s]ection 349 of the Bankruptcy Code lists the various effects of dismissal of the underlying bankruptcy case; conspicuously absent from that list is automatic termination of jurisdiction of related cases." *In re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992). In the case of adversary proceedings, numerous courts have ruled that jurisdiction is not automatically terminated with the dismissal of the underlying bankruptcy case, and that bankruptcy courts have discretion to retain jurisdiction over adversary proceedings. *Morris*, 950 F.2d at 1534-35 (citations omitted). The rationale for retention of jurisdiction over an adversary proceeding is that some cases "have progressed so far that judicial interference is needed to unravel or reserve the rights of parties." *Morris*, 950 F.2d at 1535.

LaSalle makes much of the fact that the appeal at issue here did not derive from a separate adversary proceeding but from a turnover order that was entered on the bankruptcy case itself. Under the facts of this case, however, we find that is a distinction without a difference. The matter on appeal involved a discrete dispute between two creditors that was not mooted by the dismissal of the bankruptcy itself. In challenging the turnover order, the government was asking the district court to interpret the agreed order which emerged from the adversary proceeding between itself and LaSalle. The debtor's rights were not implicated in this dispute, as the sole issue was whether LaSalle was entitled to all or only a portion of the proceeds. The district court's remand for further exploration of that issue did not require the court to "disinter" the debtor, as LaSalle insists. Factually, then, the appealed matter was very much like the appeal of a separate adversary proceeding.

Furthermore, the general rule that when the underlying case is dismissed, all related proceedings are dismissed is clearly in tension with the general rule that the filing

of a notice of appeal divests a lower court of jurisdiction over the matter on appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *In re Alwan Bros. Co.*, 115 B.R. 148, 150 (Bankr. C.D. Ill. 1990) ("[u]pon the filing of a notice of appeal from an order of the bankruptcy court, the bankruptcy court loses jurisdiction over matters involved in the appeal").

> The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. . . . The 'jurisdictional significance' of a pending appeal applies equally to a bankruptcy court. The filing of a notice of appeal to a district court divests a bankruptcy court of jurisdiction to proceed with matters raised by such appeal. This divestment of jurisdiction preserves the integrity of the appellate process by avoiding needless confusion which would flow from putting the same issues before two courts at once.

In re de Kleinman, 150 B.R. 524, 526 (Bankr. S.D.N.Y. 1992) (citations omitted). In the instant case, the integrity of the appellate process is at serious risk if a bankruptcy court can deprive a district court of jurisdiction over an appeal by simply dismissing the underlying bankruptcy.

LaSalle's argument that the whole case, including pending appeals, falls when the underlying bankruptcy is dismissed has force where the matter on appeal is entirely dependent on the existence of the bankruptcy. For example, LaSalle relies heavily on *In re Income Property Builders, Inc.*, 699 F.2d 963 (9th Cir. 1982), a case where the matter on appeal was whether the bankruptcy court had properly lifted the automatic stay.[5] Because the stay is depen-

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[5] LaSalle also cites *In re Woodhaven, Ltd.*, 139 B.R. 745 (Bankr. N.D. Ala. 1992) and *Matter of Garcia*, 115 B.R. 169 (Bankr. N.D. Ind. 1990) for the proposition that a dismissed case can never be "undismissed." However, no appeal was pending in the district court in either of these cases when the underlying bankruptcy was dismissed.

dent on the existence of the bankruptcy, the dismissal of the case disposed of any dispute about the stay. In other words, the dismissal of the case brought about a full resolution of all disputes between the parties, mooting the controversy regarding the stay.

In contrast, in the instant case, a live controversy still existed between two creditors when the bankruptcy court dismissed the underlying bankruptcy. The dismissal did not fully resolve or otherwise moot the issue on appeal. Having lost jurisdiction over the matter on appeal, the bankruptcy court did not have the power to dismiss the portion of the case that was on appeal. Nor did the bankruptcy court need to "retain" jurisdiction over the case in order to be able to assert jurisdiction once the case was remanded.

We therefore agree with the government that as long as the controversy had not been rendered moot by subsequent events, the bankruptcy court should have accepted the mandate of the district court and revisited the agreed order as directed. A lower court is not free to ignore the mandate of a higher court. *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948) ("[A]n inferior court has no power or authority to deviate from the mandate issued by the appellate court."); *In re Roberts*, 846 F.2d 1360, 1363 (Fed. Cir. 1988) ("Unlike the authority to reconsider its own rulings, a district court is without choice in obeying the mandate of the appellate court."). A bankruptcy court is similarly bound by this rule.

III. CONCLUSION

For the foregoing reasons, we reverse the district court's judgment of March 21, 1994 affirming the order of the bankruptcy court, and remand the case to the bankruptcy court for further proceedings consistent with this opinion and with the district court's April 16, 1992 memorandum opinion and order remanding the government's first appeal in this case to the bankruptcy court.

REVERSED AND REMANDED

GARZA, *Circuit Judge*, concurring:

Although I agree with the majority's implicit holding that the dismissal of the underlying bankruptcy case does not deprive the district court of the power to remand a proceeding that was appealed prior to the dismissal, I disagree with the majority's holding that the remand deprives the bankruptcy court of its discretion to 1) consider its own jurisdiction and 2) decide whether it should actually adjudicate the dispute. For that reason, I concur in the judgment only.

I agree with the majority's statement that "[d]ismissal of a bankruptcy proceeding normally results in dismissal of related proceedings because federal jurisdiction is premised upon the nexus between the underlying bankruptcy case and the related proceedings,[1] but this general rule is not without exceptions." Slip op. at 5-6.[2] The question is whether an exception applies here. Although it is par-

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[1] The confirmation of a reorganization plan or the close of a bankruptcy estate regularly results in the dismissal of related claims. *See In re Querner*, 7 F.3d 1199, 1201 (5th Cir. 1993) ("[A]s a general rule the dismissal or closing of a bankruptcy should result in the dismissal of related proceedings."); *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989) ("As a general rule, the dismissal of a bankruptcy case should result in the dismissal of 'related proceedings' because the court's jurisdiction of the latter depends, in the first instance, upon the nexus between the underlying bankruptcy case and the related proceedings."). This result occurs because the nexus between the related claim and the bankruptcy estate no longer exists. *See In re Querner*, 7 F.3d at 1201 ("The general rule favors dismissal because the court's jurisdiction over the related proceedings depends upon the nexus between the underlying bankruptcy case and the related proceeding.").

[2] *See also In re Querner*, 7 F.3d at 1201 ("Notwithstanding the general rule, however, nothing in the statute governing bankruptcy jurisdiction mandates automatic dismissal of related proceedings upon termination of the underlying bankruptcy case."); *In re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992) ("[B]ankruptcy courts are not automatically divested of jurisdiction over related cases when the underlying bankruptcy case is dismissed.").

tially correct that "[t]he rationale for retention of jurisdiction . . . is that some cases 'have progressed so far that judicial interference is needed to unravel or reserve the rights of parties,' " slip op. at 6 (citation omitted), the rationale for retaining jurisdiction turns on more than the degree to which a case has progressed.

In this case, "[t]he debtor's rights were not implicated in this dispute, as the sole issue was whether LaSalle was entitled to all or only a portion of the proceeds." Slip op. at 6. Therefore, regardless of the outcome, there will be no return of funds to the estate. LaSalle appears to argue that because the estate no longer exists, neither does any nexus. I distinguish, however, "between the determination of the existence of jurisdiction at the outset of [the dispute] and the determination of whether 'related' claims should be dismissed with the dismissal of the bankruptcy case." *In re Smith*, 866 F.2d at 580.[3] Turnover actions arise out of the bankruptcy case and proceedings initiated to correct errors in a turnover action are related to that bankruptcy case; accordingly, initial jurisdiction existed.

The question now is whether the bankruptcy court still had jurisdiction over the remanded proceeding after the underlying bankruptcy had been dismissed. Because LaSalle failed to give the government proper notice of the turnover action, the bankruptcy court must reconsider the entire turnover action as if it had not yet been heard. Because the underlying bankruptcy case has been dismissed,[4] the first question a bankruptcy court must address is whether the circumstances warrant retention of bankruptcy jurisdiction. The majority, however, would deprive the

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[3] *See also In re Querner*, 7 F.3d at 1201 (addressing existence of jurisdiction "while the [bankruptcy] case was proceeding"); *In re Morris*, 950 F.2d 1531, 1534 (11th Cir. 1992) (looking to whether the dispute "was related to the bankruptcy case at the time of its commencement").

[4] The parties, including the Government, agreed or at least acquiesced to the dismissal. *See* slip op. at 3.

bankruptcy court of its discretion and would mandate actual adjudication of this proceeding. I would allow the bankruptcy court its full range of authority.[5]

In determining whether to retain jurisdiction, courts look to four factors: economy, convenience to the parties, fairness to the parties, and comity. *Querner*, 7 F.3d at 1202; *In re Carraher*, 971 F.2d at 328; *In re Morris*, 950 F.2d at 1534. Thus, when claims had been pending for several years and concerned issues with which bankruptcy courts are familiar, the factors have warranted continuing jurisdiction. *See, e.g, In re Carraher*, 971 F.2d at 328 (finding postbankruptcy jurisdiction appropriate where comity not implicated because issue concerned res judicata effect of prior bankruptcy decision and claims had been pending for six years); *In re Morris*, 950 F.2d at 1534 (continuing jurisdiction over contract claim that had been

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[5] I find this situation analogous to that in which the proceeding in question concerns only matters of state law. Under the majority's reasoning, if the remanded dispute rested only on issues of state law, the bankruptcy court would nonetheless be required to adjudicate it. Resolution of state claims, however, properly remains within a federal court's *discretionary* pendent jurisdiction. *See In re Querner*, 7 F.3d at 1202 (analogizing postbankruptcy jurisdiction over related claims to pendent jurisdiction over state law claims) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 353, 108 S. Ct. 614, 620-21, 98 L. Ed. 2d 720 (1988)); *In re Carraher*, 971 F.2d at 328 ("turn[ing] for guidance to cases considering the authority of federal district courts to retain pendent state claims"); *In re Morris*, 950 F.2d at 1534 ("The disposition of an adversary proceeding is appropriately compared to the disposition of pendent state claims . . . ."); *In re Smith*, 866 F.2d at 580 ("[d]rawing upon an analogy to the disposition of ancillary and pendent claims"). Indeed, the Supreme Court in *Carnegie-Mellon* rejected an argument that would require the federal district courts to retain jurisdiction over pendent state claims after the companion federal claims had been dismissed: "Under petitioners' suggested approach, district courts would retain jurisdiction over cases that . . . properly belong in state courts. There is no reason to compel or encourage district courts to retain jurisdiction over such cases when the alternative of remand is readily available." *Carnegie-Mellon*, 484 U.S. at 352 n.10, 108 S. Ct. at 620 n.10.

pending six years); *In re Smith*, 866 F.2d at 580 (holding post-bankruptcy jurisdiction proper over fraud claim pending for four years). In contrast, continuing jurisdiction was not proper when the initiation of the dispute was recent, no action had been taken prior to the dismissal, and the dispute concerned issues of probate law, in which state courts had more expertise. *In re Querner*, 7 F.3d at 1202.

In this case, the dispute between LaSalle and the United States has been pending for several years. If the bankruptcy court declines jurisdiction, the parties would have to refile and relitigate the same issues in district court. Accordingly, judicial economy, convenience, and fairness favor jurisdiction. Moreover, because the issue remaining concerns bankruptcy law, not state law, comity is not implicated. Consequently, the factors stated above support the continuation of jurisdiction.

I would therefore hold that where a bankruptcy court dismisses a bankruptcy case while a matter related to the bankruptcy has been appealed, the bankruptcy court has the discretion to retain jurisdiction and decide the matter remanded by the appellate court. *In re Querner*, 7 F.3d at 1202 (citing *Carnegie-Mellon*, 484 U.S. at 353, 108 S. Ct. at 620-21); *In re Carraher*, 971 F.2d at 328; *In re Morris*, 950 F.2d at 1534; *In re Smith*, 866 F.2d at 580. Because the majority eliminates the bankruptcy court's discretion and mandates adjudication without first addressing the question of the bankruptcy court's discretion to retain jurisdiction,[6] I cannot agree with its reasoning. Accordingly, I concur in the judgment.

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[6] *See In re Morris*, 950 F.2d at 1535-36 (remanding for consideration of merits of appeals only because "we cannot say that the bankruptcy court abused its discretion by retaining jurisdiction over the adversary proceeding . . . .").

[Dated January 14, 1992]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Case No. 90 B 03686
STATISTICAL TABULATING CORPORATION, a Delaware corporation, a/k/a STAT-TAB,	)	Chapter 11
Debtor.	)	Hon. Thomas James

ORDER

At Chicago, Illinois, in said District this 14th day of Jan., 1992.

THIS MATTER COMING ON the Motion to Disburse Collateral and Dismiss Chapter 11 Case and Amendment to Motion to Disburse Collateral and Dismiss Chapter 11 Case (collectively, "Motion") filed by LaSalle Bank Lakeview ("LaSalle"); due notice of the Motion having been given to all creditors of this estate; all objections to the relief requested in the Motion having been withdrawn; the Court having reviewed the Motion and being otherwise fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Debtor, by and through its counsel, is authorized and directed to pay over to LaSalle all proceeds of life insurance policies in the approximate amount of $121,694 held by Debtor in account number 416687-2 at Harris Trust and Savings Bank.

2. Debtor shall turn over by assignment to LaSalle all of its remaining assets and documents related thereto (which assets shall remain subject to all perfected liens, claims and encumbrances thereon, including, without limitation, those liens granted to LaSalle pursuant to Court Orders dated March 15, 1991 and December 12, 1991), including, without limitation, (i) contract receivable by and between Debtor and Consultants in Data Processing, Inc., dated July 15, 1990, (ii) claims against Northeastern Illinois Railroad Corporation, which claims shall remain subject to the attorneys' lien in the amount of $12,695.33 in favor of Stack, Filpi & Kakacek, Chtd., 140 S. Dearborn Street, Suite 411, Chicago, Illinois, and (iii) account receivable and contract receivable from Measured Market Systems. Any collections from Debtor's assets in excess of the debt of LaSalle shall be turned over to Debtor.

3. LaSalle shall place the proceeds, if any, from the contract receivable by and between Debtor and Consultants in Data Processing, Inc., dated July 15, 1990, net of all costs of collection, ("Proceeds") in escrow at LaSalle. LaSalle shall have the right to apply the Proceeds to the unpaid balance of its claim against Debtor sixty (60) days after written notice of LaSalle's intent to apply the Proceeds has been sent to the Internal Revenue Service c/o Ben Norris, United States Department of Justice, P.O. 555 Fourth Street, N.W., Washington, D.C. 20001 unless an order of court is entered prior to termination of said 60 day period prohibiting LaSalle from applying the Proceeds to its debt.

4. From Debtor's debtor in possession operating account held at LaSalle, Lasalle shall reissue those payroll checks for the pay period ending August 15, 1990 on which payment was not previously made and which total approximately $19,000.

5. This Chapter 11 case is dismissed.

6. Debtor shall cause to be paid all fees owing under 28 U.S.C. §1930 and the Court shall retain jurisdiction to determine any disputes regarding such fees and to enforce collection of the same.

ENTER:

/s/ Thomas James
Bankruptcy Judge
January 14, 1992

[Dated April 16, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
STATISTICAL TABULATING CORPORATION, a Delaware corporation, a/k/a STAT-TAB,	)	
	)	
Debtor.	)	91 C 4887
	)	
UNITED STATES,	)	Appeal from
	)	
Appellant,	)	90 B 3686
	)	
STATISTICAL TABULATING CORPORATION, a Delaware corporation, a/k/a STAT-TAB, and LASALLE BANK LAKEVIEW,	)	
Appellees.	)	

MEMORANDUM OPINION AND ORDER

This case is before the Court on appeal by the Government from the bankruptcy court's order granting the motion of appellee, LaSalle Bank Lakeview, for Turnover of Sale Proceeds. LaSalle Bank and the United States each had a valid, perfected lien on certain property of the debtor, Statistical Tabulating Corporation (Stat-Tab). The current dispute centers on whether the bankruptcy court was correct in allowing all of the proceeds from two sales of the debtors assets to be distributed to LaSalle Bank.

The Government contends that the bankruptcy court should not have disbursed the proceeds to LaSalle Bank, because the bank failed to provide the Government with proper notice of its motion seeking that relief. If the notice was sufficient, the Government argues the case should be remanded to the bankruptcy court for a determination of whether the Bank's security interest extended to all of Stat-Tab's assets.

BACKGROUND

On February 27, 1990, Stat-Tab filed for bankruptcy under Chapter 11 of the Bankruptcy Code. At the time of its Chapter 11 filing, Stat-Tab was indebted to LaSalle Bank under the terms of a promissory note and an equipment lease in the aggregate amount of $1,624,333. This debt was secured on April 4, 1989, through an agreement granting Stat-Tab a security interest in its assets. Meanwhile, in February and March of 1989, the United States assessed Stat-Tab for delinquent employment taxes for the first three quarters of 1988 in the amount of $975,353.95. On May 24, 1989, the Government secured its interest by filing a Notice of Federal Tax Lien. Thus the appellant and the appellee each held a lien on the property of the debtor.

On May 22, 1990, the United States initiated an adversary proceeding against LaSalle Bank and Stat-Tab seeking a determination of the priority of the two liens on the assets of Stat-Tab. LaSalle Bank answered the complaint on August 16, 1990, asserting its priority. It also filed a counterclaim alleging that it held a valid lien in the Stat-Tab assets, which was superior to the Government's lien. After discovery, this adversary proceeding was resolved by an Agreed Order dated December 12, 1990, in which the United States agreed that the Bank's

lien had priority over its own lien. In the Agreed Order, the bankruptcy court dismissed the complaint filed by the IRS against Stat-Tab and LaSalle Bank. The court entered judgment in favor of the Bank, and against the IRS, on the counterclaim, and found that "LaSalle has a first, prior security interest in and liens on the assets of Debtor and the security interest of the IRS in said assets is junior to that of LaSalle."

While the parties were litigating the priority of their respective liens, the bankruptcy court authorized Stat-Tab to sell certain assets. These sales were conducted on June 20 and August 13, 1990, and the proceeds of those sales totalled approximately $730,000. The liens held by LaSalle Bank and the Government attached to the sale proceeds. On June 21, 1991, the Bank filed a Motion for Turnover of Sales Proceeds ("Turnover Motion"), in which it sought to have the proceeds from the two sales released to it in partial satisfaction of its priority interest. The Bank served notice of the Turnover Motion, in accordance with the appearances filed in the adversary proceeding and the bankruptcy case. Accordingly, the Bank served notice on Benjamin R. Norris of the Department of Justice, via telecopier, and also on the District Counsel for the IRS in Chicago, by messenger. The Government failed to appear at the hearing, and the bankruptcy court orally granted the Bank's motion.

It is the outcome of this motion of June 21, 1991, that the Government now protests. The Government contends that the failure of the Bank to provide it with proper notice is fatal to the Bank's motion for turnover. If, however, this Court finds that the notice was sufficient, the Government argues that the case should be remanded to the bankruptcy court to determine whether the Bank's security interest extended to all of the debtor's assets sold

pursuant to the bankruptcy court's orders of June and August 1990; and, if not, which portion of the sale proceeds were derived from assets covered by the Bank's security interest, with the remainder to be turned over to the Government.

ANALYSIS

Thus, the first issue the Government asks this Court to resolve is whether LaSalle Bank's Motion for Turnover of Sales Proceeds was fatally defective because improper notice was given to the Government. The Government argues that the Turnover Motion was either a contested matter under Bankruptcy Rule 9014 or an adversary proceeding under Bankruptcy Rule 7001. In either case, the requirements for service of process and notice are provided in Rule 7004. Under Rule 7004(b)(4), service may be made upon the United States "by mailing a copy of the summons and complaint to the United States attorney for the district in which the action is brought and also the Attorney General of the United States at Washington, District of Columbia."

The Bank argues, however, that the Government has been sidetracked by the heading of the contested motion. According to the Bank, although it called the motion its "Motion for Turnover of Sale Proceeds," this heading was inaccurate in the sense that a turnover proceeding, which falls within the terms of Rule 7001, is generally a proceeding to recover, from a third-party, money or property which belongs to the estate of the debtor. The motion of June 21, 1991, on the other hand, sought to disburse money in the hands of the debtor to the lien holder with the priority lien. According to LaSalle Bank, its request should really have been termed a "disbursement," because it had already been adjudicated the priority lien holder,

and therefore the disbursement was nothing more than the "natural consequence" of that ruling. Because of the non-adversarial nature of the request for disbursement, compliance with the particularities of Rule 7004 was not necessary; and, in any event, the service it made upon the IRS and the Justice Department satisfied Rule 7004.

Following this same logic—that the disbursement was a natural consequence of the Agreed Order—the Bank argues that the Government lacks standing to challenge the disbursement. This argument depends on the Bank's contention that the Government was not aggrieved. According to the Bank, by the terms of the Agreed Order, the Government was not entitled to any of the sales proceeds, and therefore, the fact that the entirety went to the Bank was of no consequence to the Government. The Bank concludes that, not only does the Government lack standing to challenge the disbursement, but it cannot seek to relitigate the consequences of the Agreed Order, which it signed.

The Bank's arguments depend on its interpretation of the Agreed Order of December 12, 1990, which determined the priority of liens. As noted previously, the Agreed Order served "(1) to dismiss this complaint filed by the IRS against Debtor and LaSalle with prejudice and (2) to enter an agreed order with respect to the counterclaim filed by LaSalle against the IRS to reflect the priority of security interests of the IRS and LaSalle." The Agreed Order went on to hold that "LaSalle has a first, prior security interest in and to the assets of the Debtor and that the security interest of the IRS is junior to that of LaSalle." The Bank claims that this language gave it a priority interest in *all* of Stat-Tab's assets. Because the proceeds generated by the sales of those assets

did not fully satisfy Stat-Tab's indebtedness to the Bank, the Bank contends that it was entitled to the proceeds in their entirety.

The Bank's interpretation of the Agreed Order ignores the parameters of its own counterclaim. The counterclaim sought to resolve whether LaSalle Bank had a priority interest in the debtor's property. Its security interest derived from a security agreement between the Bank and Stat-Tab, and from two supplements to the agreement. Those agreements gave the Bank a security interest in:

> 1. All of the debtor's receivables, defined as accounts, contract rights, instruments, documents, chattel paper, general intangibles and all forms of obligations owing to the debtor, all proceeds thereof and all of the debtor's rights to any merchandise which is represented thereby.
>
> 2. All inventory, all contract rights with respect thereto and all documents representing the same, with "inventory" defined as all goods intended for sale or lease by the debtor, or goods to be furnished by the debtor under contracts of service, and all raw materials, goods in process, finished goods, materials and supplies of every nature used or useable in connection with the manufacture, packing, shipping, advertising, selling, leasing or furnishing of such goods.
>
> 3. All goods (as defined in Article 9 of the Uniform Commercial Code) whether then owned or after-acquired by the debtor and wherever located, all replacements and substitutions therefor or accessions thereto, and all proceeds thereof.

Because the Bank's counterclaim sought resolution of the security interest defined above, it may not have ex-

tended to all of the debtor's assets.[1] By contrast, federal tax liens attach to all of a taxpayer's property once a Notice of Federal Tax Lien is filed. *J.D. Court, Inc. v. United States*, 712 F.2d 258, 260-61 (7th Cir. 1983), *cert. denied* 466 U.S. 927 (1984). Thus, when on March 15, 1990, the bankruptcy court granted the Bank and the IRS a "joint, first, priority perfected lien and security interest (with the priority of the Bank and the IRS with respect thereto to be reserved and determined hereinafter) upon all existing and after-acquired property of the [debtor's estate]," it was careful to note that this lien did "not modify the preexisting rights of the IRS and the Bank to any of the Collateral encumbered by the lien." And, when the bankruptcy court finally determined the priority of the liens on December 12, 1990, its ruling did not purport to extend the rights of the parties beyond the controversy established in the complaint and counterclaim.

The lack of specificity in the Agreed Order apparently led each party to place its own interpretive gloss on it. Because the Order held in favor of the Bank on its counterclaim, the IRS assumed that the Bank's priority interest extended no further than the security interest at issue in the counterclaim. On the other hand, because the Agreed Order failed to explicitly limit the priority interest vested in the Bank, the Bank assumed it got first shot at all of the proceeds from the earlier sales of Stat-Tab's assets.

---

[1] This is not to say that it did not extend to all of the assets sold in the sales authorized by the bankruptcy court. It does not appear to the Court that either the bankruptcy court or the parties addressed the issue of which of those assets the Bank's security interest had attached to.

Because it is unclear what the parties and the bankruptcy court intended by the Agreed Order, or for that matter whether they were unified in their intentions, it is not clear to the Court that the issue of which assets the Bank's priority lien extended to is res judicata. Because the subsequent disbursement of the sale proceeds to the Bank may well have prejudiced the Government's interests, the Court cannot say that the Government lacks standing to challenge the priority determination for the disbursement ofthe proceeds.

Moreover, because the Bank's lien may not have extended to the entirety of the sale proceeds, the motion for disbursement affected the Government's interests. "A motion for an order which attempts to affect the claim of a party must be properly served on that party." *In re Brooks*, 129 Bkrtcy 484, 486 (Bkrtcy N.D. OH 1991); *see also In re L.G. Edwards Farm, Inc.*, 30 Bkrtcy 842, 844 (Bkrtcy E.D. MO 1983) (to the extent that movant seeks recovery of money, it should proceed by means of adversary proceeding, especially when other claimants may claim superior interest). Proper service on a government agency, as spelled out in Rule 7004, requires service on the Attorney General in Washington, D.C. and on the United States Attorney for the district in which the claim is being litigated. While the Bank contends that the notice it provided in seeking disbursement was sufficient, the Court concludes otherwise.

The Bank served notice of its Motion for Turnover of Sales Proceeds on the Attorney General in Washington, by telecopier, and on the District Counsel for the IRS in Chicago, by messenger. The Government challenges both the means of service, arguing that service by mail was the only proper means, and the failure to serve the local United States Attorney, which the Government ar-

gues was fatal to the bankruptcy court's jurisdiction over the motion.

In order to assess these arguments, it is necessary to understand the rationale underlying the requirements of Rule 7004(b)(4). As an initial matter, the Court notes that the Internal Revenue Service cannot sue or be sued; instead, in cases involving revenue issues, the proper party in interest is the United States government. *In re Simms*, 33 Bkrtcy 792, 793 (N.D. Ga. 1983), *citing Blackmar v. Guerre*, 342 U.S. 512, 514 (1952). Litigation involving the United States government is supervised by the Justice Department, which decides whether to proceed with various stages of litigation. Therefore, if notice of dispositive motions never reaches the office of the United States Attorney who is overseeing the litigation, then the government's case cannot be properly conducted.

There is some authority for the proposition that the stringent requirements of Rule 7004(b)(4) apply only to service of process and initiatory papers. *See, e.g., Zinke v. United States Department of Treasury*, 1991 U.S. Dist. Lexis 7818, *8 (E.D. N.Y. May 31, 1991) (finding that service of notice of motion to amend pleadings mailed to United States Attorney's office in Southern District of New York, rather than that in the Eastern District, was not fatal, because Rule 7004(b)(4) did not apply); *In re Morrell*, 69 Bkrtcy 147, 149 (N.D. Cal. 1986) (finding that original service of process must be made upon appropriate officials of the Department of Justice). Even if Rule 7004 (b)(4) does not extend to every motion throughout the course of a bankruptcy proceeding, however, service was insufficient in this case. Although the Government had filed an appearance in the adversary proceeding involving the competing liens on the debtors assets, it had never appeared in the bankruptcy proceeding. The motion to dis-

burse the sales proceeds was filed in the bankruptcy proceeding. Therefore, merely adhering to the service list in the adversary proceeding did not provide adequate notice under Rule 7004(b)(4).

In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Supreme Court held that the notice required for due process must be "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. These precepts might excuse improper methods of service, so long as actual notice is effected; they do not, however, excuse service of notice on the wrong party. Therefore, while counsel at the local IRS office had filed his appearance in the adversary proceeding, he could not serve to initiate action on the Government's behalf in the bankruptcy proceedings without guidance from the United States Attorney's office for the Northern District of Illinois.

CONCLUSION

Accordingly, the Court vacates the bankruptcy court's order disbursing the sales proceeds, orders the Bank to properly serve its motion on the Government and directs the bankruptcy court to consider whether its previous disbursement order gave the Bank a greater security interest in the debtor's property than was due under the security agreement and its supplements.

ENTER:

/s/ John A. Nordberg
United States District Judge

DATED: April 16, 1992

[Dated June 2, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
STATISTICAL TABULATING CORPORATION, a Delaware corporation, a/k/a STAT-TAB,	)	
	)	
Debtor.	)	91 C 4887
	)	
UNITED STATES,	)	Appeal from
	)	
Appellant,	)	90 B 3686
	)	
STATISTICAL TABULATING CORPORATION, a Delaware corporation, a/k/a STAT-TAB, and LASALLE BANK LAKEVIEW,	)	
	)	
Appellees.	)	

MEMORANDUM OPINION AND ORDER

On April 16, 1992, in an appeal from the Bankruptcy Court, this Court vacated an order disbursing sales proceeds to LaSalle Bank Lakeview (the "Bank"), one of the creditors of the debtor, Statistical Tabulating Corporation ("Stat-Tab"). The Court held that, in the proceeding before the Bankruptcy Court, the Bank had failed to properly serve its motion seeking turnover of the sales proceeds on the government, which, like the Bank, held a security interest in the debtor's property. At the hear-

ing on the uncontested motion, the Bankruptcy Court had granted the Bank's motion and disbursed the entirety of the sales proceeds to the Bank. The parties agree that the Bank's security interest in those proceeds is superior to that of the Government. What they dispute is the extent to which the Bank's lien extended to the underlying assets. In its opinion of April 16, this Court ordered the case remanded for consideration of whether the Bank's lien extended to all of the assets which were the subject of the sales. The Bank now asks this Court to reconsider its earlier ruling and to hold that, as a matter of law, the Bank was granted a security interest in all of Stat-Tab's personal property and so was entitled to the proceeds from all of the assets sold. Because, the Bank argues, the extent of their lien can be decided as a matter of law, there is no reason to remand to the Bankruptcy Court.

The Bank's security interest is defined under a security agreement and two supplements to it. The initial agreement, captioned "Accounts Receivable," defines its scope in the first paragraph, which reads:

> As security for Obligations (as herein defined) at any time owing by us to you or your subsidies we hereby assign to you and grant to you a security interest in all of our Receivables (as herein defined) whether now existing or hereafter arising or in which we now have or may hereafter acquire any rights. The term "Receivables" means and includes accounts, contract rights, instruments, documents, chattel paper, general intangibles and all forms of obligations owing to us, all proceeds thereof and all of our rights to any merchandise which is represented thereby.

The first supplement, captioned "Security Interest in Inventory," defines its scope as:

> [A]ll Inventory now and hereafter owned by us, all contract rights with respect thereto and all documents representing the same (all herein referred to as "Collateral") and all proceeds of the Collateral. The term "Inventory" means and includes all goods intended for sale or lease by us, or to be furnished by us under contracts of service and all raw materials, goods in process, finished goods, materials and supplies of every nature used or useable in connection with the manufacture, packing, shipping, advertising, selling, leasing or furnishing of such goods.

Finally, the second supplement, under the heading "Security Interest in Goods, Chattels and Equipment," grants the Bank a security interest in all goods as defined in Article 9 of the Uniform Commercial Code. "Goods," as defined in Ill. Rev. Stat. ch. 26, § 9-105(1)(h), "includes all things which are moveable at the time the security interest attaches or which are fixtures (Section 9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction."

The Bank argues that these three components of the security agreement (hereinafter the "security agreement") extend to every kind of personal property as enumerated in Article 9 of the U.C.C.; therefore, the agreement encompasses all of the assets sold, and the proceeds were rightfully turned over to the Bank. The Government counters that most of the items sold pursuant to the Bankruptcy Court's authorization were general intangible goods, which were not covered by the security agreement. Although the term "general intangibles" appears in the security agreement, it only appears within the definition of "accounts receivables." Accordingly, the Government contends that the security agreement only extends to those general intangibles that fall within the rubrick of receivables.

The Bank's argument voids the meaning of the term "receivables," which is both the caption and the general term defined in the security agreement. The agreement clearly states "we hereby assign to you and grant to you a security interest in all of our Receivables (as herein defined)." It requires a feat of labyrinthine reasoning to assign to the term "general intangibles," which is listed in the definition of "receivables," a meaning independent of its limiting term. General intangibles are clearly intended to be a subset of receivables.

Looking to the assets that were sold by the permission of the Bankruptcy Court, many of them would appear to fall within the category of general intangibles. For example, included among the assets sold pursuant to the Bankruptcy Court's order of August 13, 1990 were trade marks, service marks and good will. The security agreement only extends to receivables, inventory and goods. The latter explicitly excludes general intangibles, and the examples given do not constitute either inventory or receivables. Accordingly, on the record before the Court, it would appear that the Bank's lien did not extend to all of the assets sold and, so, to the entirety of the proceeds that were distributed to the Bank.

Moreover, the Government has raised a question as to whether the Bank's interest in the proceeds was perfected by the filing of a proper financing agreement. As the comment to §9-110 of the Illinois Uniform Commercial Code explains "[t]he security agreement and the financing statement are double screens through which the secured party's rights to collateral are viewed, and his rights are measured by the narrower of the two." Ill. Rev. Stat. ch. 26 § 9-110, code comment; *see also In the matter of Martin Grinding & Machine Works, Inc.*, 793 F.2d 592 (7th Cir. 1986); *Fulton State Bank v. Deutz-Allis Credit*

Corp., 701 F. Supp. 151, 153 (N.D. Ill. 1988). The Government argues that the financing statement filed by the Bank in connection with its security interest in Stat-Tab's assets failed to mention general intangibles. Therefore, to the extent that the collateral underlying the sale proceeds distributed to the Bank included general intangibles, the Bank's interest in that collateral may not be properly perfected.

These uncertainties in the extent of the Bank's security interest are sufficient to dictate to the Court that it should not grant the Bank's motion to reconsider. This Court cannot say, as a matter of law, in the face of a limited record that would appear to say otherwise, that the Bank's security interest extended to all of the collateral that produced the disputed proceeds. On the other hand, the Court declines to decide the reach of the Bank's lien, because the record does not afford it the means to do so. Accordingly, the Bank's motion to reconsider is denied, and the case is remanded to the Bankruptcy Court in accordance with this Court's memorandum opinion and order of April 16, 1992.

ENTER:

/s/ John A. Nordberg
United States District Judge

DATED: June 2, 1992

United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Memorandum Order

Name of Presiding Judge: Thomas James
Case No. 90 B 3686
Date: February 10, 1993
Title of Cause: Statistical Tabulating Corporation

On February 10, 1993, the court held a hearing on motion of United States to reopen bankruptcy. For the reasons stated in open court on that date, the court finds and concludes that the motion is to be denied. Motion denied. Hearings on motions of United States to compel discovery and for partial summary judgment are concluded.

[1]* IN THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In The Matter Of:

STATISTICAL TABULATING CORPORATION,

Debtor.

No. 90 B 3686
Chicago, Illinois
February 10, 1993—10:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS JAMES

APPEARANCES:

For the United States IRS:

MS. SHARON GROMER
(Office District Counsel IRS)

For LaSalle Bank:

MS. PAULA JACOBI
(Schwartz, Cooper, Kolb & Gaynor)

* * * * *

---

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[3] THE CLERK: Statistical Tabulating Corporation, 90 B 3686.

MS. GROMER: Good morning, again, your Honor. Sharon Gromer on behalf of the United States.

THE COURT: Thank you.

MS. JACOBI: Paula Jacobi, again, your Honor, on behalf of LaSalle Bank.

MS. GROMER: Your Honor, this case is on remand from the District Court. And the District Court entered an order vacating the order disbursing the sale of proceeds, ordered the bank to properly serve its motion on the government, and directing this Court to consider whether the previous dismissalment order—

THE COURT: Excuse me. You can go through all of that, but you better understand where I'm coming from, because that has no meaning. This case was dismissed on notice to the United States. Everybody—I recall that there was some fussing about the notice, about whether they would agree to the dismissal. Having agreed to the dismissal, I don't think that this Court should say that it should be reopened.

In order to properly administer this case at this time, assuming that this were an appropriate motion, the Court is of the opinion that the order dismissing the case would be vacated. At that time it would be incumbent upon the representatives of Statistical Tabulating Corporation to take [4] charge of the administration of this case. All of the assets, as I understand it, have been transferred. And now there is a dispute between the bank and the United States as to how those moneys should be disposed of. That, to me, isn't sufficient reason to reopen the case or vacate that order of dismissal, which was entered with notice to the United States without objection by the United States.

I think that there is, as euphemistically stated, a contract here or the law that can be brought before the Court in a proper court of general jurisdiction, not the Bankruptcy Court. No longer is anything arising out of the code or related to the code or whatever that—I'm sure I'm misquoting that section of Title 28 that talks about how we should handle these matters. But there is nothing here before the Bankruptcy Court, as far as the Court is concerned. That doesn't mean that Judge Nordberg's order is not effective. It is. It sets up the rights of the parties. But still, it has to be brought—it can't be brought here. You can't reopen this dismissed Chapter 11 case.

MS. GROMER: So the Court is entering an order refusing to reopen?

THE COURT: I'm denying the motion.

MS. GROMER: Okay.

THE COURT: For the reasons I have stated, the motion of the United States to reopen bankruptcy is denied. We'll [5] send copies around.

MS. GROMER: Thank you.

MS. JACOBI: Thank you, Judge.

THE COURT: Okay.

(Which were all the proceedings heard on this date in the above-entitled cause.)

* * * * *

[Dated March 21, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
STATISTICAL TABULATING CORPORATION, INC.,	)	
	)	
Debtor.	)	
	)	Bankruptcy Appeal
UNITED STATES OF AMERICA,	)	
	)	
Appellant,	)	Case No. 93 C 2690
v.	)	
	)	
LASALLE BANK LAKEVIEW,	)	
	)	
Appellee.	)	

MEMORANDUM OPINION AND ORDER

This case is an appeal from an Order entered on February 12, 1993, by the Judge Thomas James in bankruptcy case No. 90 B 3686. In that Order, the Judge denied the United States' motion to reopen the bankruptcy case on the grounds that it was without jurisdiction to do so. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158. For the reasons stated below, the court affirms the decision of the bankruptcy court.

Whether the _____ jurisdiction to re-open the case is a question of law to be reviewed *de novo*. *In re Jogert, Inc.*, 950 F.2d 1498, 1501 (9th Cir. 1991).

Background

The underlying bankruptcy case began on February 27, 1990, when Statistical Tabulating Corporation ("Stat-Tab") filed a petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. During the course of the bankruptcy, the United States filed an adversary proceeding against LaSalle Bank ("LaSalle") and Stat-Tab claiming that it had a priority lien on Stat-Tab's assets. On December 12, 1990, the court held that LaSalle had a first priority security interest in the debtor's assets, and that IRS's interest was junior to that of LaSalle. The United States did not appeal this Order. Eventually, Stat-Tab's assets were sold, and LaSalle moved to have the debtor turnover the proceeds from the sale. The United States did not appear on the motion, nor did it object.

On June 21, 1991, the bankruptcy court granted LaSalle's turnover motion. The United States appealed this decision to the United States District Court, claiming that it did not receive adequate notice of the motion. That appeal was assigned to the Judge John A. Nordberg.

While the appeal was pending, LaSalle filed a motion to disburse collateral and dismiss the case pursuant to 11 U.S.C. § 1112 ("§ 1112"). Notice of the motion was served on the United States, which did not object.[1] On January 14, 1992, the bankruptcy court granted the motion to dismiss. Significantly, in regards to the sale proceeds, Judge James stated:

> LaSalle shall place the proceeds . . . in escrow at LaSalle. LaSalle shall have the right to apply the pro-

[1] At a hearing on the motion, the attorney for the United States stated, "[W]e do not object to the bank's motion, I believe, to dismiss the case or for turnover." (Transcript at 3).

> ceeds to the unpaid balance of its claim against Debtor sixty (60) days after written notice of LaSalle's intent to apply the proceeds has been sent to the Internal Revenue Service . . . **unless an order of court is entered prior to termination of said 60 day period prohibiting LaSalle from applying the proceeds to its debt.**

(January 14, 1992 Order at 3) (emphasis added). The Clerk of the bankruptcy court sent a notice of dismissal to all creditors, including the United States. The United States did not appeal the dismissal and made no motion to stay the transfer of funds.

On April 16, 1992, three months after the underlying bankruptcy case had been dismissed, the district court ruled on the government's appeal of the bankruptcy court turnover order. Specifically, Judge Nordberg vacated the June 21, 1991 Order disbursing the sale proceeds and directed the bankruptcy court to consider whether its December 12, 1990 Order gave LaSalle a greater security interest in the debtor's property than was due under the security agreement.[2]

Pursuant to Judge Nordberg's instructions, the United States filed a motion to reopen the bankruptcy case eleven months after the dismissal of the bankruptcy case. The bankruptcy court asked the parties to brief the issue of whether it had jurisdiction. On February 10, 1993, after a hearing on the issue, Judge James denied the motion on the grounds that it lacked jurisdiction. In reaching that decision, the bankruptcy court concluded that Judge Nordberg's decision could be given effect "in a proper court of general jurisdiction," but that "there is nothing here

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[2] LaSalle filed a Motion to Reconsider, which was denied on June 2, 1992.

before the Bankruptcy Court." (February 10, 1993 Transcript at 3-4). It is this February 10, 1993 Order which the United States now appeals to this court.

Discussion

The government argues that the bankruptcy court has a duty to reopen a closed estate whenever there is *prima facie* evidence that the assets have not been fully administered. (Appellant's Brief at 4 (citing *In re Joslyn's Estate*, 171 F.2d 159 (7th Cir. 1948)). The government also claims that the case should have been reopened since there was evidence that Stat-Tab's assets were not properly administered. In support, the United States cites *In re Thomas*, 204 F.2d 788, 791 (7th Cir. 1953) (court has discretion to reopen case when assets were not fully administered), and *In re Frontier Enterprises*, 70 Bankr. 356, 359 (C.D. Ill. 1987) (court may reopen a case under 11 U.S.C. § 350(b) to correct error in the distribution of assets).

I. Reopening a Dismissed Case

The cases cited by the United States discuss the power of a bankruptcy court to reopen a case under 11 U.S.C. § 350 ("§ 350"). However, as Stat-Tab correctly notes § 350 applies only to cases which were closed, meaning that the debtor's estate was fully administered and the trustee discharged. Stat-Tab's bankruptcy was not closed; it was dismissed pursuant to § 1112 of the Bankruptcy Code.[3] This distinction is significant.

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[3] Although the Order dismissing the case did not refer to the Bankruptcy Code, LaSalle's motion to dismiss was brought under § 1112. (*See* Motion dated October 1, 1991 ¶ 10).

Orders dismissing a bankruptcy case are treated differently from orders closing an estate. *In re Garcia*, 115 Bankr. 169, 170 (N.D. Ind. 1990) (citing *In re Income Property Builders*, 699 F.2d 963, 965 (9th Cir. 1982)). As the court explained in *Garcia*:

> An order closing a bankruptcy case contemplates that the bankruptcy proceedings and administration of the estate have been completed. An order of dismissal, however, terminates a bankruptcy proceeding for reasons other than the completed administration of the estate.

Id. Moreover, the effect of a dismissal is to "undo" the bankruptcy, restoring the assets and parties to their prepetition status as if the case had never been filed. *In re Woodhaven, Ltd.*, 139 Bankr. 745, 748 (N.D. Ala. 1992); *see also* 11 U.S.C. § 349. Because a dismissed case is treated as though it never existed, it cannot be reopened pursuant to § 350.

Furthermore, the government does not argue and the record does not suggest that this bankruptcy case was dismissed under § 1112 in error. In fact, in moving to dismiss, LaSalle noted:

> Debtor has no ability to confirm a plan of reorganization. It has no free and clear assets with which to pay any claims other than LaSalle. Nor is there anything left to administer in this case. Accordingly, dismissal pursuant to Section 1112 of the Bankruptcy Code is in the best interest of this estate and its creditors and other parties in interest.

(Motion to Dismiss at 3-4). Since the "inability to effectuate a plan" is a basis for dismissal under § 1112,[4] this

[4] See 11 U.S.C. § 1112(b)(2).

bankruptcy case was properly dismissed under that section, and the government's authority under § 350 is inapposite.

II. Bankruptcy Court's Jurisdiction After Dismissal

Since the United States did not request a stay of enforcement of the turnover order, Judge James had jurisdiction to transfer the funds and to dismiss the case. Also, for the reasons stated above and more fully below, the fact that the underlying bankruptcy case was dismissed is fatal to this appeal.

As a general rule, all adversary proceedings filed in a bankruptcy case are dismissed when the case is dismissed.[5] This rule applies to pending appeals, as well. *See In re Olive Street Invest., Inc.*, 972 F.2d 214 (8th Cir. 1992). In *Olive Street Investment*, the debtor appealed an order lifting the automatic stay in a Chapter 11 proceeding, but failed to obtain a stay of the order. While that appeal was pending, the bank foreclosed on its collateral and the bankruptcy court issued an order dismissing the case pursuant to 11 U.S.C. § 1112.[6] Subsequently, the district court dismissed the appeal as moot.

The appellate court affirmed, reasoning that the "dismissal of the underlying bankruptcy proceeding may indi-

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[5] The reason for this rule is that jurisdiction over the adversarial proceeding was premised upon the nexus between the underlying bankruptcy case and the related proceedings. *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989). Once the bankruptcy case has been dismissed, the jurisdictional basis for the adversarial claim no longer exists.

[6] The debtor appealed the dismissal to the district court where it was affirmed before the previous appeal was decided. Thus, the dismissal became final.

cate that no case or controversy remains with respect to the issues directly involving the reorganization of the estate." *Id.* at 215 (quoting *In re Dahlquist*, 751 F.2d 295 (8th Cir. 1985)). The court also determined that the propriety of the order lifting the automatic stay directly related to the bankruptcy proceeding. Since that proceeding had been dismissed, there was no purpose in determining whether the order was proper. *Id.* Similarly, the court *In re Income Property Builders, Inc.*, 699 F.2d 963, 964 (9th Cir. 1982), explained:

> Once the bankruptcy was dismissed, a bankruptcy court no longer had power to order the stay or to award damages . . . . A remand by us to the bankruptcy court would therefore be useless. If we had some power to restore the bankruptcy proceeding, the situation would be different, but there is no appeal from the order dismissing it.

Id.

This case presents a similar scenario. Like the appellant in *Olive Street Investment*, the United States did not request a stay of the January 14, 1992 Order while the appeal of the June 21, 1991 turnover order was pending. In addition, before the appeal was resolved, the underlying bankruptcy case was dismissed. Since Stat-Tab's bankruptcy had been "undone" by the time the district court ruled, this appeal is moot.

Moreover, even if this court had the power to reinstate the bankruptcy proceeding, it concludes that it would be improper to do so. In this case the bankruptcy court invited the government to make a motion staying the enforcement of the turnover order. (*See* Opinion dated January 14, 1992 at 3). Specifically, Judge James ordered LaSalle to place the funds in escrow and provide the United States with notice that the proceeds would be

turned over to LaSalle in 60 days unless it sought an order prohibiting the transfer. The government failed to do so, and cannot now complain that the funds are beyond the reach of the bankruptcy court. Thus, the court agrees that the bankruptcy court, having properly dismissed Stat-Tab's case, lacked jurisdiction to grant the United States' motion to reopen the case.[7]

III. Withdrawal of Reference to Bankruptcy Court

Finally, in the alternative, the government asks that this court "revoke the Bankruptcy Court's reference over this proceeding, and hear the United States' and LaSalle's respective claims pursuant to the funds at issue." (Appellant's Brief at 5 (citing 28 U.S.C. § 157(d) ("§ 157")). Although § 157 would permit a district court to withdraw an adversarial claim from the bankruptcy court, it is not clear that it would permit this court to exercise jurisdiction over a claim which appears to have been fully litigated below. Nonetheless, the court need not decide this issue. The burden of demonstrating cause for withdrawal was on the government, *Vista Metals Corp. v. Metal Brokers Int'l. Inc.*, 161 Bankr. 454, 456 (E.D. Wis. 1993), which made no argument in support of its request. Therefore, the motion for withdrawal of the reference is denied.

---

[7] Some courts have construed a motion to reopen a dismissed case as a motion to vacate the dismissal order pursuant to Bankruptcy Rule 9024 and Rule 60 of the Federal Rules of Civil Procedure. *See In re Woodhaven*, 139 Bankr. at 749; *In re Garcia*, 115 Bankr. at 170. However, the United States did not advance this argument, and the court will not address it in this appeal. Moreover, it is worth noting that bankruptcy courts still have considerable discretion to grant or deny motions to vacate. *In re Garcia*, 115 Bankr. at 170.

Conclusion

For the foregoing reasons, the court affirms the decision of the bankruptcy court, and dismisses this appeal.

ENTER:

/s/ Ann Claire Williams, Judge
United States District Court

Dated: March 21, 1994

Supreme Court, U.S.
FILED
JAN 20 1996
CLERK

No. 95-712

In the Supreme Court of the United States

OCTOBER TERM, 1995

LASALLE BANK LAKE VIEW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
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QUESTION PRESENTED

Whether the bankruptcy court has jurisdiction, on remand from the district court, to adjudicate a controversy between creditors that arose during the bankruptcy case and that was on appeal to the district court when the bankruptcy court dismissed the bankruptcy case.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-712

LASALLE BANK LAKE VIEW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 60 F.3d 1286. The opinion of the district court (Pet. App. 35-43) is reported at 166 B.R. 322. The opinion of the bankruptcy court (Pet. App. 32-34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1995. The petition for a writ of certiorari was filed on October 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, Statistical Tabulating Corporation, Inc. (the debtor) commenced a Chapter 11 bankruptcy proceeding. Petitioner and the United States had competing liens in the debtor's property. The bankruptcy proceedings led to the liquidation and distribution of the debtor's assets to its creditors. In the course of those proceedings, petitioner obtained an order from the bankruptcy court for the turnover of approximately $730,000 from the sale of various assets of the debtor (Pet. App. 2, 16-18). That order, however, had been entered improperly because the United States had not been given valid notice and had not appeared to contest entry of the order (*id.* at 2).

The United States filed a timely appeal upon learning of the entry of the turnover order. While that appeal was pending in the district court, the liquidation of the debtor proceeded to conclusion. The remaining proceeds of the liquidation were distributed primarily to petitioner as the principal creditor. On January 14, 1992, petitioner obtained an order from the bankruptcy court dismissing the debtor's bankruptcy case (Pet. App. 2-3, 13-15).

2. A few months later, on the government's appeal from the turnover order, the district court entered an order that (Pet. App. 25):

> vacate[d] the bankruptcy court's order disbursing the sales proceeds, order[ed] the Bank to properly serve its motion on the Government and direct-[ed] the bankruptcy court to consider whether its previous disbursement order gave the Bank a greater security interest in the debtor's property than was due * * *

The district court remanded the case to the bankruptcy court for further proceedings in accordance with the district court's opinion (*id.* at 30).

On remand, the bankruptcy court declined to follow the mandate of the district court. The bankruptcy court reasoned that, because that court had dismissed the debtor's bankruptcy case, the bankruptcy court no longer had jurisdiction over the merits of its prior turnover decreee (Pet. App. 31-34). On appeal from that ruling, the district court adopted the rationale of the bankruptcy court and held that the dismissal of the bankruptcy case deprived the bankruptcy court of further jurisdiction (*id.* at 35-43).

3. The court of appeals reversed (Pet. App. 1-12). The court rejected petitioner's contention that a dismissal of the bankruptcy case deprives the bankruptcy court of jurisdiction to address issues that were "pending on appeal in the district court" at the time the bankruptcy court entered its order dismissing the case (*id.* at 5). The court noted that an appeal divests the bankruptcy court of jurisdiction over the matter on appeal (*id.* at 7) and that, "[h]aving lost jurisdiction over the matter on appeal, the bankruptcy court did not have power to dismiss the portion of the case that was on appeal. Nor did the bankruptcy court need to 'retain' jurisdiction over the case in order to be able to assert jurisdiction once the case was remanded" (*id.* at 8). The court concluded that, because the controversy on appeal had not become moot, the bankruptcy court "should have accepted the mandate of the district court" and reconsidered the unlawfully entered turnover order (*ibid.*).

In a concurring opinion, Judge Garza reached the same conclusion by a different route. He reasoned that the bankruptcy court should have discretion

whether to exercise jurisdiction in these circumstances. He agreed, however, with the disposition of this case by the majority because, on the facts of this case, the factors relating to the exercise of such discretion "support the continuation of jurisdiction" (Pet. App. 12).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly noted (Pet. App. 2-3 n.1) that the controversy between petitioner and the United States concerning the correct distribution of the debtor's assets arose out of the underlying bankruptcy proceeding. When the erroneous turnover order entered by the bankruptcy court was appealed to the district court during the pendency of the bankruptcy case, jurisdiction over that matter vested in the district court in its role as an appellate court. The lower court then lacked authority to take action to deprive the appellate court of its jurisdiction (*id.* at 8):

> Having lost jurisdiction over the matter on appeal, the bankruptcy court did not have the power to dismiss the portion of the case that was on appeal.

As the court of appeals concluded, the provisions of the Bankruptcy Code that detail the effect of a dismissal of a bankruptcy case (11 U.S.C. 349) cannot be construed to permit "a bankruptcy court [to] deprive a district court of jurisdiction over an appeal by simply dismissing the underlying bankruptcy"

(Pet. App. 7).[1] As petitioner ultimately acknowledges (Pet. 18), there is ample precedent for the conclusion that a bankruptcy court retains jurisdiction to adjudicate unresolved matters that are related to the bankruptcy even after dismissal of the bankruptcy case in chief. See, *e.g.*, *In re Porges*, 44 F.3d 159 (2d Cir. 1995); *In re Querner*, 7 F.3d 1199, 1201-1202 (5th Cir. 1993); *In re Morris*, 950 F.2d 1531, 1533-1534 (11th Cir. 1992); *In re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992); *In re Smith*, 866 F.2d 576, 579-580 (3d Cir. 1989).

2. Petitioner errs in contending that the decision in this case conflicts with decisions of other courts of appeals.

a. Petitioner contends that the Ninth Circuit has held that "the dismissal of a bankruptcy case removes any power from the bankruptcy court to reopen it" (Pet. 16, citing *In re Income Property Builders, Inc.*, 699 F.2d 963, 964 (9th Cir. 1983)).[2] That contention is not correct.

The issue on appeal in *In re Income Property Builders, Inc.* was whether, during the bankruptcy

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[1] The court noted that petitioner did not, in any event, properly invoke 11 U.S.C. 349, because that statute provides that a dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case" (Pet. App. 4-5). Petitioner, however, was attempting to urge the dismissal as a basis for retaining the property of the estate that petitioner obtained through the invalid turnover order (*id.* at 5).

[2] Petitoner also cites (Pet. 17) two bankruptcy court decisions (*In re Woodhaven, Ltd.*, 139 B.R. 745 (Bankr. N.D. Ala. 1992), and *In re Garcia*, 115 B.R. 169 (Bankr. N.D. Ind. 1990)). Neither of those cases involved whether the bankruptcy court has jurisdiction to adjudicate matters on remand from appellate proceedings that were pending on the date that the bankruptcy case was dismissed.

case, the bankruptcy court had properly lifted the automatic stay provided by 11 U.S.C. 362. The question whether the automatic stay remained in effect was, of course, entirely dependent on whether the bankruptcy case continued in existence. The court of appeals concluded in *In re Income Property Builders, Inc.* that, because the bankruptcy case had been dismissed during the pendency of the appeal, the controversy regarding the lifting of the automatic stay must be dismissed "as moot." 699 F.2d at 964.

In the present case, by contrast, the court of appeals correctly observed that "a live controversy still existed between two creditors when the bankruptcy court dismissed the underlying bankruptcy. The dismissal did not fully resolve or otherwise moot the issue on appeal" (Pet. App. 8). Nothing in *In re Income Property Builders, Inc.* conflicts with that conclusion.

b. Petitioner further contends (Pet. 18-19) that, in holding that the bankruptcy court must comply with the mandate of the district court to redetermine an order that the district court vacated on appeal, the decision in this case conflicts with decisions holding that the bankruptcy court has *discretion* whether to retain jurisdiction of pending matters following the dismissal of the underlying bankruptcy case. But the decisions that petitioner cites (Pet. 18)—*In re Porges*, 44 F.3d 159 (2d Cir. 1995); *In re Querner*, 7 F.3d 1199 (5th Cir. 1993); *In re Morris*, 950 F.2d 1531 (11th Cir. 1992); *In re Carraher*, 971 F.2d 327 (9th Cir. 1992); and *In re Smith*, 866 F.2d 576 (3d Cir. 1989)—do not involve orders relating to the distribution of property that were vacated in appellate proceedings that were pending at the time the bankruptcy court dismissed the bankruptcy case. None of the cases

cited by petitioner thus considers or addresses whether the bankruptcy court would have discretion to decline to exercise jurisdiction over a matter remanded by the district court upon the conclusion of a timely appeal.

Moreover, as the concurring opinion of Judge Garza reflects, even if the bankruptcy court were thought to have discretion in these circumstances, the factors that relate to the exercise of that discretion would require the conclusion that such jurisdiction must be exercised (Pet. App. 12). Under either the majority or concurring views, the result on the facts of this case is thus the same—the bankruptcy court must exercise jurisdiction to reconsider its invalid turnover order on remand from an appellate proceeding that was pending when the bankruptcy court dismissed the bankruptcy case. Further review of the decision in this case is thus not warranted for the additional reason that resolution of the claimed conflict would not alter the ultimate disposition of the case. See *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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